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# U.S. Department of Justice Antitrust Division

## Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

July 2019

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**Introduction**<sup>1</sup>

Antitrust compliance programs promote vigorous competition in a free market economy by creating a culture of good corporate citizenship within a company that seeks to prevent antitrust violations. Although an antitrust compliance program may not prevent every violation, an effective compliance program should be able to detect and address potential antitrust violations. Moreover, effective antitrust compliance programs not only prevent, detect, and address antitrust violations, they also further remedial efforts and help foster corporate and individual accountability by facilitating a corporation's prompt self-reporting and timely and thorough cooperation in the Antitrust Division's investigations. Indeed, a truly effective antitrust compliance program gives a company the best chance to obtain the significant benefits available under the Division's Corporate Leniency program.<sup>2</sup>

This guidance document focuses on the evaluation of compliance programs in the context of criminal violations of the Sherman Act such as price fixing, bid rigging, and market allocation. It is intended to assist Division prosecutors in their evaluation of antitrust compliance programs at the charging and sentencing phases of an investigation. Although the evaluation of antitrust compliance programs is an important factor in the prosecutorial decision-making process at both charging and sentencing, a number of other important factors not addressed by this compliance-specific guidance also must be considered.

This document is based on the Division's experience and expertise evaluating antitrust compliance programs, along with resources within the Department of Justice concerning the evaluation of corporate compliance programs, including the Justice Manual, *see, e.g.*, JM § 9-28.800, and Criminal Division Guidance on the Evaluation of Corporate Compliance Programs.<sup>3</sup> It

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<sup>1</sup> This guidance document offers the views of the Antitrust Division of the Department of Justice and has no force or effect of law. It is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party. Nothing in this document should be construed as mandating a particular outcome in any specific case, and nothing in this document limits the discretion of the U.S. Department of Justice or any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

<sup>2</sup> *See Leniency Program Page*, U.S. DEP'T JUSTICE, ANTITRUST DIV., <https://www.justice.gov/atr/leniency-program>.

<sup>3</sup> U.S. DEP'T JUSTICE, CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Apr. 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [hereinafter CRIMINAL DIVISION COMPLIANCE GUIDANCE].

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also draws on the United States Sentencing Guidelines' evaluation of effective compliance programs. See U.S.S.G. § 8B2.1.

**I. Evaluating a Corporate Antitrust Compliance Program at the Charging Stage**

When deciding whether and to what extent to bring criminal charges against a corporation, Division prosecutors must consider the Principles of Federal Prosecution and the Principles of Federal Prosecution of Business Organizations (collectively hereinafter referred to as "Principles") and the Division's Leniency Policy. See JM §§ 9-27.001, *et seq.*; 9-28.300–28.400.<sup>4</sup> Under the Principles, prosecutors consider a number of factors, including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision." JM § 9-28.800.

Although the Department has no formulaic requirements regarding the evaluation of corporate compliance programs, the Justice Manual asks prosecutors to consider three "fundamental" questions in their evaluation:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?"
3. "Does the corporation's compliance program work?"

JM § 9-28.800.

This document addresses these questions in the criminal antitrust context by identifying elements of an effective antitrust compliance program. Although Division prosecutors should consider these factors when evaluating antitrust compliance programs, the factors are not a checklist or formula. Indeed, not all factors will be relevant in every case, and some factors in the Division's analysis are relevant to more than one question. Moreover, the Division recognizes that a company's size affects the resources allocated to antitrust compliance and the breadth of the company's compliance program.<sup>5</sup> Division prosecutors should evaluate compliance

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<sup>4</sup> A more detailed discussion of the Division's approach to charging can be found in Chapter Three of the Antitrust Division Manual, <https://www.justice.gov/atr/file/761141/download>.

<sup>5</sup> See U.S.S.G. § 8B2.1 note 2(C) ("The formality and scope of actions that an organization shall take to [implement an effective compliance program] . . . including the necessary features of the organization's standards and procedures, depend on the size of the organization. . . . A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization. . . . [A] small organization may [rely on] . . . less formality and fewer resources.").

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programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company's antitrust compliance program.

**A. Preliminary Questions**

At the outset of any inquiry into the efficacy of an antitrust compliance program, Division prosecutors should ask three preliminary questions about a company's compliance efforts:

- 1) Does the company's compliance program address and prohibit criminal antitrust violations?
- 2) Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- 3) To what extent was a company's senior management involved in the violation?

These questions are intended to help Division prosecutors focus the analysis discussed below on the factors most relevant to the specific circumstances under review.

**B. Elements of an Effective Compliance Program**

The goal of an effective antitrust compliance program is to prevent and detect violations. While the best outcome is to prevent antitrust violations from occurring, the Division recognizes that "no compliance program can ever prevent all criminal activity by a corporation's employees." JM § 9-28.800. According to the Justice Manual, the "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." *Id.* Indeed, "[t]he keys for successful [antitrust] compliance [programs] in general are efficiency, leadership, training, education, information and due diligence."<sup>6</sup>

The factors that Division prosecutors should consider when evaluating the effectiveness of an antitrust compliance program include: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including

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<sup>6</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, PROMOTING COMPLIANCE WITH COMPETITION LAW 12 (2012), <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> [hereinafter OECD COMPLIANCE PAPER].

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continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.<sup>7</sup> Questions relevant to each of these considerations are set forth below.

**1. Design and Comprehensiveness**

Although a Code of Conduct can be an effective tool for communicating a company's antitrust-related policies and procedures, the Justice Manual also requires prosecutors to evaluate whether a compliance program "is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner." JM § 9-28.800. Division prosecutors should consider the design, format, and comprehensiveness of the antitrust compliance program. With respect to this analysis, key considerations are the adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees and agents (hereinafter "employees and agents" will be collectively referred to as "employees").

- Before becoming aware of any investigation, did the company have an antitrust compliance program establishing standards and procedures to prevent and detect criminal conduct? When was the company's antitrust compliance program first implemented? How often is it updated? Is it periodically reviewed and does it seek feedback from employees? Are compliance materials updated with recent developments and periodically refreshed so they do not become stale?
- What is the format of the antitrust compliance program? Is it in writing?
- Who is responsible for integrating antitrust policies and procedures into the company's business practices? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls? For example, does the company have a way of tracking business contacts with competitors or attendance at trade association meetings, trade shows, and other meetings attended by competitors? Is that tracking system regularly monitored?
- What guidance has been provided to employees who could flag potential antitrust violations (*e.g.*, those with approval authority for pricing changes and participation in industry meetings, certification responsibilities for bidding activity, or human

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<sup>7</sup> See JM § 9-28.800; CRIMINAL DIVISION COMPLIANCE GUIDANCE; INTERNATIONAL CHAMBER OF COMMERCE, THE ICC ANTITRUST COMPLIANCE TOOLKIT 2 (2013), <https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf> [hereinafter ICC COMPLIANCE TOOLKIT].

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resources/hiring authority)? Do they know what antitrust risks the company faces and what conduct potentially indicates an antitrust violation?

- What guidance has been provided to employees about document destruction and obstruction of justice? Does the company have clear document retention guidelines and does it educate employees on the ramifications of document destruction and obstruction of justice?

**2. Culture of Compliance**

An effective compliance program will “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” U.S.S.G. § 8B2.1(a). Support of the program from the company’s top management is critical to the success of an antitrust compliance program. The Division has recognized that “[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one.”<sup>8</sup> Indeed, employees should be “convinced of the corporation’s commitment to [the compliance program].” JM § 9-28.800.

Division prosecutors should examine the extent to which corporate management has clearly articulated — and conducted themselves in accordance with — the company’s commitment to good corporate citizenship.<sup>9</sup>

- What is the company’s senior leadership doing to convey the importance of antitrust compliance to company employees? How have senior leaders, through their words and actions, encouraged (or discouraged) antitrust compliance? What concrete actions have they taken to demonstrate leadership in the company’s antitrust compliance or remediation efforts if relevant?

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<sup>8</sup> Brent Snyder, Deputy Assistant Att’y Gen., U.S. Dep’t Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 4-5 (September 9, 2014), <https://www.justice.gov/atr/file/517796/download>.

<sup>9</sup> See U.S.S.G. § 8B2.1(b)(2)(A)–(B) (the company’s “governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight” of it; “[h]igh-level personnel . . . shall ensure that the organization has an effective compliance and ethics program.”).

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- Have senior managers tolerated antitrust violations in pursuit of new business, greater revenues, or maintaining customers? Were senior managers involved in the violation(s)?
- Has there been personal accountability by senior leadership for failures in the company's antitrust compliance?
- What else is the company's senior leadership doing to set the tone from the top or bring about culture change throughout the company?

**3. Responsibility for the Compliance Program**

For the antitrust compliance program to be effective, those with operational responsibility for the program must have sufficient autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program. See U.S.S.G. § 8B2.1(b)(2)(C) ("To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.")

- Who has overall responsibility for the antitrust compliance program? Is there a chief compliance officer or executive within the company responsible for antitrust compliance? If so, to whom does the individual report, *e.g.*, the Board of Directors, audit committee, or other governing body? How often does the compliance officer or executive meet with the Board, audit committee, or other governing body? How does the company ensure the independence of its compliance personnel?
- How does the compliance function compare with other functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? Is the compliance function sufficiently senior within the organization to command respect and adequate resources?
- Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? If so, what proportion of their time is dedicated to compliance responsibilities? Why has the company chosen the compliance structure it has in place? Has the company's size impacted that decision?
- Do compliance personnel report to top management regarding the effectiveness of antitrust compliance? What is the format of their report? See U.S.S.G. § 8B2.1(2)(b)(2)(C).

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- Who is delegated day-to-day operational responsibility for the antitrust compliance program? Do compliance personnel responsible for antitrust compliance have adequate experience and familiarity with antitrust law? Has the level of experience and qualifications in these roles changed over time?
- Does the company allocate sufficient compliance resources to educating employees on antitrust law? Are such resources allocated efficiently by focusing on high antitrust risk areas? For example, does the compliance program identify and adequately train employees who have frequent contact with competitors?
- Who reviews the effectiveness of the compliance function and what is the review process?

**4. Risk Assessment**

A well-designed corporate compliance program is “designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business.” JM § 9-28.800. Thus, an effective antitrust compliance program should be appropriately tailored to account for antitrust risk.<sup>10</sup>

- Is the company’s antitrust compliance program tailored to the company’s various industries/business lines and consistent with industry best practice? Does the compliance program provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring? What efforts has the company made to implement antitrust-related policies and procedures that reflect and address the antitrust risks it faces, including legal and technical changes in the way the company conducts business? For example, as employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?
- What information or metrics has the company collected and used to help detect antitrust violations? How has the information or metrics informed the company’s

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<sup>10</sup> See U.S.S.G. § 8B2.1, application note 7 (“If, because of the nature of an organization’s business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing.”)



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antitrust compliance program, *e.g.*, through training, modifications, or internal controls? For example, if the company bids on contracts, is bid information subject to evaluation to detect possible bid-rigging? Does the company evaluate pricing changes for possible price-fixing?

- Is the company's antitrust risk assessment current and subject to periodic review? Have there been any updates to antitrust policies and procedures in light of lessons learned or marketplace, legal, technological, or other developments? Do these updates account for risks discovered through prior antitrust violations or compliance incidents?

**5. Training and Communication**

An effective antitrust compliance program will include adequate training and communication so that employees understand their antitrust compliance obligations. "Ideally, [antitrust compliance training] empowers employees to do business confidently insofar as they are clearer on what is and is not permissible, and can resist pressures more effectively (whether these are internal or external)."<sup>11</sup> For example, training can teach relevant personnel that competitor communications could signal an antitrust violation if they are not part of a legitimate joint venture or other procompetitive or competitively neutral collaboration. In addition, training should instruct employees involved in such collaboration that a legitimate collaboration between competitors can become problematic if it develops into an exchange of competitively sensitive business information or future pricing information, or if other antitrust violations occur. Training should address what to do when an employee thinks activity is potentially unlawful.

- How has the company communicated its antitrust policies and procedures to all employees? Did the company introduce antitrust policies in a way that promotes and ensures employees' understanding? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls?
- If the company has a Code of Conduct, are antitrust policies and principles included in the document? If the company has foreign subsidiaries, are there cultural, linguistic, or other barriers to implementing the company's antitrust compliance policies, and how are those barriers addressed?
- What mechanisms does the company have in place to ensure that employees follow its compliance program? See U.S.S.G. § 8B2.1(b)(5)(A). How is the compliance program distributed to employees? Are the compliance program and related training

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<sup>11</sup> ICC COMPLIANCE TOOLKIT at 12.

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materials easily accessible to employees, *e.g.*, via a prominent location on the company's intranet?

- Must employees certify that they have read the compliance policy? If so, how? Do the certification policies apply to all employees? Do they apply to members of the Board of Directors? How often must employees certify their antitrust compliance?
- Does the company provide antitrust compliance training? In what form is the antitrust training and who provides it? Is the training provided online or in-person (or both), and what is the company's rationale for its choice?
- Who receives antitrust compliance training? What analysis has the company undertaken to determine whom to train and to tailor training to the company's lines of business and antitrust risks?
- Does training include senior management/supervisors and the Board of Directors? What is the lowest level employee who must receive antitrust compliance training? Are contractors or agents included in the training?
- How often does antitrust compliance training occur? Is antitrust compliance training required when an employee begins work? Is antitrust compliance training required prior to attendance at trade shows or trade association or other meetings with competitors? Are employees required to certify their completion of the training program? *See* U.S.S.G. § 8B2.1(b)(4). If so, how? How is attendance at the training recorded and preserved? Who ensures that employees attended the required training and certified their attendance?
- How does the training test the level of employees' understanding of the antitrust laws? Is training tailored to the employee's duties and does it provide examples that could arise in the business unit he or she is a part of? For example, if the company bids on contracts, does the company's compliance program educate employees on bid rigging and market allocation? Are those with pricing authority educated about price fixing?
- How often is antitrust training updated to reflect marketplace, legal, technological, or other developments? Has the training addressed lessons learned from prior antitrust violations or compliance incidents?

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**6. Periodic Review, Monitoring and Auditing**

A critical part of an effective antitrust compliance program is the effort to review the compliance program and ensure that it continues to address the company's antitrust risks. See U.S.S.G. § 8B2.1(b)(5). An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program. See U.S.S.G. § 8B2.1(b)(5)(A).<sup>12</sup> "Periodically assessing whether parts of [a] company's business or certain business practices are complying with antitrust laws in practice allows senior managers to know whether the company is moving closer to its antitrust compliance objectives."<sup>13</sup> Such periodic testing also "helps ensure that there is continued, clear and unambiguous commitment to antitrust compliance from the top down, that the antitrust risks identified or the assessment of these risks have not changed (or if they have changed, to reassess controls) and that the risk mitigation activities/controls remain appropriate and effective."<sup>14</sup> Review also may help "identify substantive antitrust concerns, rectify any illegal [behavior], and to assess if it is appropriate to apply to one or more antitrust agency for [leniency]."<sup>15</sup>

- What methods does the company use to evaluate the effectiveness of its antitrust compliance program? Who evaluates the antitrust compliance program? For example, is there a compliance committee that meets periodically? How often is the program evaluated? See U.S.S.G. § 8B2.1(b)(5)(B). Has the company revised its compliance program in light of any prior antitrust violations or compliance incidents?
- What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? See U.S.S.G. § 8B2.1(b)(5)(A). For example, are there routine or unannounced audits (*e.g.*, a periodic review of documents/communications from specific employees; performance evaluations and employee self-assessments for specific employees; interviews of specific employees)? Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?

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<sup>12</sup> See also ICC COMPLIANCE TOOLKIT at 65-70.

<sup>13</sup> ICC COMPLIANCE TOOLKIT at 68.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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- What is the company's process for designing and implementing revisions to its antitrust compliance policy, and has that process changed over time? Does the company consult business units prior to making changes?

**7. Reporting**

An effective compliance program includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation. Confidential reporting mechanisms can facilitate the company's detection of an antitrust violation and are an integral element of an effective compliance program.<sup>16</sup>

- Is there a publicized system in place whereby employees may report or seek guidance about potentially illegal conduct? Are there positive or negative incentives for reporting antitrust violations?
- Do supervisors or employees who become aware of a potential antitrust violation have a duty to report it to those with responsibility for compliance? What disciplinary measures does the company have for those who fail to report such conduct?
- Does the company periodically analyze reports or investigation findings for patterns or other red flags of a potential antitrust violation?
- What mechanisms does the company have in place to allow employees to report or seek guidance regarding potential criminal conduct without fear of retaliation? May employees make anonymous and confidential reports?

**8. Incentives and Discipline**

Also relevant to an antitrust compliance program's effectiveness are the "systems of incentives and discipline [] that ensure the compliance program is well-integrated into the company's operations and workforce."<sup>17</sup>

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<sup>16</sup> See JM § 9-28.900 (requiring prosecutors to evaluate whether the company has "established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.").

<sup>17</sup> CRIMINAL DIVISION COMPLIANCE GUIDANCE, at 2.

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- What incentives does the company provide to promote performance in accordance with the compliance program? See U.S.S.G. § 8B2.1(b)(6)(A).
- Has the company considered the implications on antitrust compliance of its incentives, compensation structure, and rewards? Does the company incentivize antitrust compliance? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied, or bonuses clawed back) because of compliance considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?
- What disciplinary measures does the company have for those who engage in antitrust violations or those who fail to take reasonable steps to prevent or detect violations? See U.S.S.G. § 8B2.1(b)(6)(B).
- Has the company disciplined anyone because of an antitrust violation? Has there been any management turnover because of the company's participation in the violation? Were the actual reasons for discipline communicated to employees? If not, why not?
- Are antitrust violations disciplined in the same manner as other types of misconduct? Can the company provide examples or data on this point?
- What is the employment status of culpable executives who have not cooperated and accepted responsibility for antitrust violations? If the company still employs culpable executives, what are their positions? What role do they have with regard to pricing, the company's compliance and internal investigation, and supervision of any potential witnesses in the government's investigation?

**9. Remediation and Role of the Compliance Program in the Discovery of the Violation**

Although a compliance program may not detect every antitrust violation in the first instance, remedial efforts and improvements to the company's compliance program may prevent recurrence of an antitrust violation. The Justice Manual directs prosecutors to consider "any remedial actions taken by the corporation, including . . . revisions to corporate compliance programs in light of lessons learned." JM § 9-28.800. The thoroughness of the company's remedial efforts is relevant to whether the antitrust compliance program was effective at the time of the antitrust violation.

Remedial efforts are also relevant to whether the compliance program was effective at the time of a charging decision or sentencing recommendation. Therefore, Division prosecutors

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should assess whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation. Division prosecutors should also consider what modifications and revisions the company has implemented to help prevent similar violations from reoccurring, and what methods the company will use to evaluate the effectiveness of its antitrust compliance program going forward.

In addition, early detection and self-policing are hallmarks of an effective compliance program and frequently will enable a company to be the first applicant for leniency under the Division's Corporate Leniency Policy. Early detection and self-policing are also relevant at the charging stage of an investigation. As articulated in the Justice Manual, "the Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own." JM § 9-28.800; *see* JM § 9-28.900. "If a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively."<sup>18</sup>

- What role did the antitrust compliance program play in uncovering the antitrust violation?
- Did anyone who had responsibility to report misconduct to the compliance group/officer know of the antitrust violation? If so, when was the violation discovered, by whom, and how was it uncovered? If not, why not?
- Has the company conducted an analysis to detect why the antitrust compliance program failed to detect the antitrust violation earlier?
- Has the company revised its antitrust compliance program as a result of the antitrust violation and lessons learned? How did the company address, and determine how to address, failures in the compliance program? Was outside counsel or an advisor involved?
- What role did the senior leadership play in addressing the antitrust violation and revising the compliance program to better detect the conduct that resulted in the antitrust violation?
- Does the company believe that changes to the antitrust compliance program will prevent the recurrence of an antitrust violation? What modifications and revisions

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<sup>18</sup> CRIMINAL DIVISION COMPLIANCE GUIDANCE, at 13.

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did the company make? How will the company evaluate the continued effectiveness of its antitrust compliance training?

- How did the company convey the changes to antitrust policies and procedures to employees? Were employees required to certify they understood the new policies?
- Does the antitrust compliance program provide guidance on how to respond to a government investigation? Does the program educate employees on the ramifications of document destruction and obstruction of justice?
- Did the compliance program assist the company in promptly reporting the illegal conduct? Did the company report the antitrust violation to the government before learning of a government investigation? How long after becoming aware of the conduct did the company report it to the government?

**II. Sentencing Considerations**

In accordance with the U.S. Sentencing Guidelines and 18 U.S.C. § 3572, when a decision is made to charge a company, Division prosecutors should evaluate whether to recommend a sentencing reduction based on a company's effective antitrust compliance program.

**A. Guidelines Credit for an Effective Compliance Program**

The Sentencing Guidelines provide several avenues for a company to receive credit for an effective compliance program. U.S.S.G. § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program. The existence and effectiveness of a compliance program also may be relevant to determining whether a company should be sentenced to probation pursuant to U.S.S.G. § 8D1.1. In addition, a compliance program may be relevant to determining the appropriate corporate fine to recommend within the Guidelines range or whether to recommend a fine below the Guidelines range. See U.S.S.G. § 8C2.8; 18 U.S.C. § 3572. The Sentencing Guidelines' criteria are minimum requirements. As explained above, the Department has no formulaic requirements regarding corporate compliance programs. Compliance programs are to be evaluated on a case-by-case basis and will depend on the company's specific compliance program and its implementation and operation.

The Sentencing Guidelines are clear that a sentencing reduction for an effective compliance program does not apply in cases in which there has been an unreasonable delay in reporting the illegal conduct to the government. See U.S.S.G. § 8C2.5(f)(2). In addition, there is a rebuttable presumption that a compliance program is not effective when certain "high-level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully

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ignorant of the offense.” U.S.S.G. § 8C2.5(f)(3)(A)–(C). Under the Sentencing Guidelines, “high-level personnel” and “substantial authority personnel” include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts. U.S.S.G. § 8A1.2, application note 3(B)–(C).

Division prosecutors should consider whether the Guidelines’ presumption that a compliance program is not effective applies and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2.5 (f)(3)(C)(i)–(iv). Relevant to this inquiry is whether: (i) individuals with operational responsibility for the compliance program had direct reporting obligations to the governing authority of the company (*e.g.*, an audit committee of the Board of Directors if applicable); (ii) the compliance program detected the antitrust violation before discovery outside of the company or before such discovery was reasonably likely; (iii) the company promptly reported the violation to the Antitrust Division; and, (iv) no individual with operational responsibility for the compliance program “participated in, condoned, or was willfully ignorant” of the antitrust violation. U.S.S.G. § 8C2.5.

Division prosecutors must assess application of the rebuttable presumption on a case-by-case basis. For antitrust violations, whether and when the company applied for a leniency marker under the Division’s Corporate Leniency Policy often will be a key factor in assessing whether or not the presumption can be rebutted.

**B. Compliance Considerations Relevant to Recommending Probation under U.S.S.G. § 8D1.1**

In each criminal case in which a company will be sentenced, Division prosecutors must also recommend whether a corporate defendant be placed on probation pursuant to U.S.S.G. § 8D1.1. The Division generally will not seek corporate probation for corporations that cooperate with the investigation and accept responsibility, except in limited circumstances, such as when a company has left culpable individuals in positions of authority, or has received a “Penalty Plus” fine adjustment for failing to report other cartel conduct at the time of a prior plea. In contrast, when a company is found guilty at trial, the Division may seek probation if the company does not accept responsibility and declines to take measures to implement or improve its antitrust compliance program. *See, e.g.*, U.S.S.G. § 8D1.1(a)(3).

If a company did not have a pre-existing antitrust compliance program at the time of the antitrust violation, Division prosecutors should inquire whether the company has put in place a compliance program that meets the requirements of an effective compliance program under U.S.S.G. § 8B2.1. If the company has not established an adequate compliance program, the Division may recommend probation and, in appropriate cases, periodic compliance reports as a condition of probation. The Division also will consider whether an external monitor is necessary to ensure implementation of a compliance program and timely reports. Moreover, if the Division



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will recommend that the company receive a “Penalty Plus” fine enhancement for the recurrence of antitrust violations, the Division is likely to seek probation and recommend periodic compliance reports as a condition of probation.

**C. Statutory Fine Reduction for Recurrence Prevention Efforts**

In addition to the Sentencing Guidelines, Title 18 of the United States Code also provides a mechanism for recognizing remedial efforts and reducing a corporation’s fine. In determining whether to impose a fine, and the amount and timing of that fine, courts shall consider any measure taken by a company to discipline personnel responsible for the offense and to prevent recurrence of the offense. *See* 18 U.S.C. § 3572(a)(8). Division prosecutors thus should consider whether a company’s extraordinary post-violation compliance efforts warrant a fine reduction.<sup>19</sup> A dedicated effort by the company’s senior management to change company culture after the antitrust violation and corporate actions to prevent the recurrence of an antitrust violation are relevant to whether staff should recommend such a fine reduction under 18 U.S.C. § 3572(a)(8). In making a recommendation for a fine reduction under 18 U.S.C. § 3572, Division prosecutors should consider:

- **Tone at the Top** – What steps has senior management taken to require and incentivize lawful behavior and participation in compliance training? Has the company demonstrated that ensuring future compliance and culture change is paramount? Has senior management accepted personal accountability for the violation (*e.g.*, accepted a reduced bonus, included antitrust compliance in the company’s compliance program, actively participated in and encouraged antitrust-related training)? Did senior management participate in the revision and implementation of a more robust compliance program in response to the antitrust violation?
- **Improvements to Pre-Existing Compliance Program** – Has the company conducted a comprehensive review of its compliance, training, monitoring, auditing, and risk control functions following the antitrust violation? How did the company modify and revise its compliance program to prevent similar conduct from reoccurring? What methods will the company use to evaluate the effectiveness of its antitrust compliance training going forward?
- **Creation of Compliance Program** – If the company had no antitrust compliance program in place prior to the charged antitrust violation, did the company create a robust program tailored to the company’s business and aimed at preventing

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<sup>19</sup> *See* Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t Justice, Antitrust Div., *Don’t “Take the Money and Run”: Antitrust in the Financial Sector* 12-13 (May 1, 2019), <https://www.justice.gov/opa/speech/file/1159346/download>.

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recurrence of an antitrust violation? Does the company's new antitrust compliance program educate employees about the illegal conduct that occurred as well as other antitrust risks? Does the compliance program provide guidance on how to respond to a government investigation? What resources are devoted to antitrust compliance? Did the company hire outside counsel or an advisor to assist the company in creating the program? What methods will the company use to evaluate the effectiveness of its antitrust compliance program going forward?

- Disciplinary Procedure** – Did the company have or create disciplinary procedures for employees who violate the law or the company's compliance program? Did the company discipline employees who engaged in the violation?